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No. 88-232

In the Supreme Court of the United States

OCTOBER TERM, 1988

ISRAEL G. GROSSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioner's request for a continuance when a superseding indictment was returned two business days before the scheduled trial date.

2. Whether petitioner violated the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, by fraudulently misappropriating confidential material information for use in securities trading.

3. Whether the confidential information that petitioner misappropriated constituted "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

4. Whether the government violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose the grand jury testimony of a co-conspirator who did not testify at trial but whose hearsay statements were admitted into evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 843 F.2d 78.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1988. A petition for rehearing was denied on May 9, 1988. On June 24, 1988, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including August 5, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 19 counts of securities fraud, in violation of 15

U.S.C. 78j(b) and 78ff, and 17 C.F.R. 240.10b-5. He was also convicted on 19 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of two years' imprisonment on ten of the securities fraud counts and 11 of the mail fraud counts, and he was fined a total of $25,000 on those counts. He was sentenced to five years' probation on the remaining counts, with the term of probation to begin upon his release from prison. The court of appeals affirmed (Pet. App. A1-A20).

1. Petitioner, an attorney, was an associate in the pension department of the law firm of Kramer, Levin, Nessen, Kamen & Frankel (Kramer Levin) in New York City. On July 9, 1986, Kramer Levin was retained by the Trustees of the Retirement Savings Plan for Salaried Employees of Colt Industries, Inc., to represent the pension plan in connection with a proposed $1.5 billion recapitalization of Colt. The proposal contemplated that Colt shareholders, with the exception of the pension plan, would redeem their common stock in exchange for a cash payment of $85 per share and newly issued shares in the recapitalized company expected to be worth $15 per share. The pension plan, which held about seven percent of Colt's common stock, would not receive cash when it redeemed its shares but instead would receive an equivalent number of shares in the recapitalized company. Public announcement of the recapitalization, which was set for July 20, 1986, was expected to cause a dramatic rise in the price of Colt's stock. Pet. App. A3.

After being retained, Kramer Levin represented the pension plan through the public announcement of Colt's recapitalization. In the course of rendering its legal services, Kramer Levin advised the plan on its obligations with respect to the proposed recapitalization, and it assisted in determining whether Colt's recapitalization proposal provided the pension plan with value equivalent to the con-

sideration that public shareholders were to receive upon redeeming their shares. During that time, Kramer Levin attempted to keep information about the recapitalization confidential by using code names for the matter and by omitting the client's name and dollar amounts on drafts of documents and correspondence. The firm also established a policy of not letting others in the firm know about the matter except on a "need-to-know" basis. In addition, the firm periodically circulated to its attorneys a memorandum stating that attorneys who received information from clients were forbidden to use it for trading or to give it to any other person. The memorandum had been circulated several times while petitioner worked at Kramer Levin, and the most recent circulation prior to July 1986 was in November 1985. Pet. App. A4.

When Colt publicly announced the recapitalization on July 20, 1986, its share price, as expected, rose dramatically. On July 18, 1986, two days before the announcement, the price was $66.75 per share. On the day of the announcement, the price climbed to $93.62 per share. Pet. App. A7.

2. On March 17, 1987, a grand jury sitting in the Southern District of New York returned a 24-count indictment charging petitioner with 12 counts of securities fraud and 12 counts of mail fraud relating to transactions in Colt stock options. The securities fraud counts alleged that, between July 11 and July 18, 1986, petitioner misappropriated confidential, nonpublic material information from Kramer Levin and its client, the Colt pension plan, regarding the imminent Colt recapitalization plan and passed it on to two relatives and a friend—George Hirschberg, Walter Hertzberg, and Norman Stein—who used the information to purchase Colt call options and thereby made a substantial profit. The companion mail

fraud counts charged that petitioner devised a fraudulent scheme to trade in the Colt options using the misappropriated confidential information and caused broker confirmation slips to be delivered through the mail for the purpose of executing the scheme. Pet. App. A8-A9.

At a pretrial conference on July 29, 1987, the district court was told that during the preceding week the government had notified petitioner's counsel that it planned to seek a superseding indictment and that it had told petitioner's counsel the contents of the anticipated superseding indictment. On Thursday, July 30, 1987, with the trial scheduled to begin on the following Monday, the grand jury returned the superseding indictment, which added 14 new counts and covered the period from July 9, 1986, to July 30, 1987. Pet. App. A9-A10.

Four of the new counts were mail fraud charges based on mailings of broker's confirmation slips for certain purchases of Colt call options that had been charged in the original indictment. The other ten new counts consisted of five securities fraud counts and five mail fraud counts. Those charges were based on five transactions involving purchases (four of Colt call options, one of Colt common stock) for the account of petitioner's brother-in-law, Saul Listokin—transactions that had been under investigation for nearly a year by the Securities and Exchange Commission (SEC) in a parallel civil proceeding.[1] The superseding indictment also added a sentence alleging that not only petitioner's family but petitioner himself received a finan-

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[1] On July 30, 1986, the SEC informed Kramer Levin that it was investigating the Colt transaction. When the SEC requested the names of all persons at the firm who knew about the transaction, Kramer Levin identified petitioner as one of those persons. The SEC subsequently initiated a civil fraud proceeding against petitioner, *SEC* v. *Grossman*, 87 Civ. 1031 (SWK) (S.D.N.Y. Feb. 17, 1987).

cial benefit from his misappropriation of the confidential information. When petitioner subsequently moved to dismiss the superseding indictment on the first day of trial, the district court denied the motion. Pet. App. A9-A10.

3. a. The evidence at trial showed that petitioner learned of the Colt recapitalization proposal on July 10, 1986, the day after Kramer Levin was retained to represent the pension plan. That day, the senior partner in the pension department met with several attorneys and briefed them on the Colt proposal. Petitioner was not at the meeting. Martin Fleischer, an associate who did attend the meeting, was assigned to analyze Colt's proposal and was therefore provided with the key financial details. That same evening, petitioner, having heard of the new matter, went to Fleischer's office and asked him if he was working on it. When Fleischer replied that he was, petitioner asked him about the nature of the transaction. Fleischer responded by telling petitioner the details of the recapitalization, including the estimated value of the new shares, the amount of cash to be paid the shareholders, and the identities of the others involved. At trial, Fleischer did not recall whether he told petitioner the name of the client. Pet. App. A4-A5.

Within hours of learning that Colt stock would increase in value following the recapitalization, petitioner (or someone using his office telephone) began making a series of calls to petitioner's relatives and a friend (Pet. App. A5). Between July 10 and July 16, 1986, petitioner placed 20 calls to his uncle, George Hirschberg; seven calls to his cousin, Walter Hertzberg; five calls to another cousin's husband, Shimon Lev; and three calls to Shimon Lev's friend and business partner, Norman Stein. In the days immediately following those telephone calls, petitioner's relatives and Stein purchased unusually large quantities of

Colt "out of the money" call options.[2] None of the individuals whom petitioner tipped had purchased Colt securities before, and all of them purchased the options without seeking or in contravention of their brokers' advice. After Colt's recapitalization was made public on July 20, 1986, petitioner's relatives and Stein realized a profit of $1,470,000 on an investment of $33,000. Pet. App. A5-A7.

Between July 10 and July 16, 1986, petitioner placed three calls to his brother-in-law, Saul Listokin, and 12 calls to Listokin's company, Listokin & Sons (L & S). During the same period, petitioner also made a series of telephone calls to Whitehall Securities and Datek Securities, discount brokerage firms with which petitioner had no account. Those calls frequently were made just before or just after petitioner placed calls to Listokin or to L & S. Three of petitioner's calls to the brokers coincided precisely with their placement of orders to purchase large quantities of Colt call options for Listokin's account. In

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[2] An "out of the money" call option entitles its holder to buy stock during a fixed period in the future at a set "strike price" that is higher than the current market price. For example, Colt "August 80" call options entitled their holders to purchase, on or before August 15, 1986, shares of Colt common stock at a strike price of $80 per share. When the price of Colt's stock rose to $93.62 per share after the public announcement of the recapitalization on July 20, 1986, those options accordingly became very valuable.

A call option purchaser is, in effect, speculating that the market price of the underlying security will rise over the strike price on or before the option's expiration date. If the price rises as hoped, "out of the money" call options can provide enormous profits on relatively small investments.

addition, there was evidence showing that petitioner went to Whitehall's offices during that same period and opened an account in the name of Listokin, although the account beneficiary was changed to Listokin & Sons Pension Plan over the telephone later that day. The options bought in the name of Listokin were sold on July 17 and 18, 1986, before the recapitalization of Colt was announced, but the losses incurred were more than covered by profits on purchases made the same days for the account of petitioner's uncle, George Hirschberg.[3] Pet. App. A5-A7.

b. The events following the public announcement of Colt's recapitalization were proved at trial primarily through the testimony of David Lev, the brother of Shimon Lev. David Lev was in Israel from July 3 to July 23, 1986. When David returned, Shimon told him that he had "made it big" by purchasing Colt call options based on a tip he had received from petitioner. Shimon asked David to become the nominal owner of the options. Shimon explained that he was concerned about an investigation into his trading in the Colt options, and he thought that David's presence in Israel would provide him with an alibi. In early August 1986, after David agreed to the plan, funds were transferred from Datek Securities to David's bank account. Pet. App. A7-A8.

After David deposited Shimon's proceeds from the Colt options transactions into his bank account, Shimon told David that he owed petitioner either $45,000 or $56,000 as

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[3] In contrast to the 50 telephone calls to his relatives and to Stein and the 14 calls to the brokerage houses that petitioner made between July 10 and July 16, petitioner made no calls to his relatives, to Stein, or to brokerage firms during the days immediately before and after the July 10 to July 16 period, except for three telephone calls to Listokin and 16 calls to Listokin's company. Pet. App. A6.

petitioner's share of the Colt options deal. Shimon explained, however, that petitioner had agreed to accept only $25,000 so that David, as the nominal holder of the proceeds from the Colt options transactions, could pay taxes on the capital gains. David subequently gave Shimon a check for $25,000 with the payee line left blank. In an attempt to launder the payment, Shimon made the check payable to Bnos Rochel, a charity from which, as he told David, he believed that he could get cash. Pet. App. A8.

c. Petitioner did not testify at trial. As his defense, petitioner argued that the government had not established beyond a reasonable doubt that he obtained information about the Colt recapitalization known by him to be confidential or that he had any involvement in the purchases of the Colt call options (Pet. 11-12). Petitioner called five character witnesses, an options expert, and the brokers of George Hirschberg and Walter Hertzberg.

4. The court of appeals affirmed (Pet. App. A1-A20). It first held (*id.* at A10-A15) that the district court did not abuse its discretion in refusing to dismiss the superseding indictment or to grant a continuance of the trial. Analyzing petitioner's several assertions of prejudice from the denial of a continuance (*id.* at A11-A15), the court concluded that "the superseding indictment did not alter substantially the government's case against [petitioner]" and "[i]ts return, even two days before trial, caused him no prejudice" (*id.* at A15).

The court of appeals also ruled (Pet. App. A15-A16) that the government did not violate the rule of *Brady* v. *Maryland,* 373 U.S. 83 (1963), by failing to turn over allegedly exculpatory grand jury testimony of Shimon Lev. The court observed (Pet. App. A16) that petitioner "had been informed specifically in the government's letter of July 23, 1987 that Shimon might have given the grand

jury exculpatory evidence." The court accordingly concluded that "[n]o *Brady* violation occurred here because *Brady* does not require the government to turn over exculpatory evidence 'if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.' " Pet. App. A15 (quoting *United States* v. *Gaggi,* 811 F.2d 47, 59 (2d Cir. 1987), cert. denied, No. 86-1818 (June 15, 1987)). The court did not resolve (Pet. App. A16) petitioner's claim that *Brady* entitled him to the actual transcripts of the grand jury testimony under Fed. R. Evid. 806 in order to impeach Shimon Lev—who did not testify at trial but who was the declarant of various co-conspirator statements testified to by David Lev—because "[petitioner] never raised his impeachment argument in the district court and therefore waived it."

The court rejected (Pet. App. A17-A18) petitioner's contention that his conduct did not violate the mail fraud statute because, under *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), Kramer Levin did not have a "property interest" in the confidential information concerning the Colt recapitalization. Finding petitioner's contention to be "specious," the court concluded (Pet. App. A18) that "the information in this case regarding the Colt recapitalization clearly falls within the definition of property under *Carpenter.*" The court observed (*ibid.*) that "the fact that Kramer Levin could not commercially exploit the information by trading on it does not mean the confidentiality of the information had no commercial value to the firm * * * because, by maintaining confidentiality, the firm would protect or enhance the firm's ~~its~~ reputation, with the result that it would not lose its clients and perhaps would gain more clients."[4]

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[4] Petitioner also argued before the court of appeals that his mail fraud conviction should be reversed because the mailings of the broker

ARGUMENT

1. Petitioner first renews his claim (Pet. 14-30) that he was entitled to a continuance of the trial because the superseding indictment was returned two business days before the scheduled trial date.

Contrary to petitioner's contention (Pet. 16-18), the decision of the court of appeals does not constitute a departure from well-established law. It has long been settled that a trial court has broad discretion to grant or deny a continuance. See, *e.g.*, *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940). More particularly, the Court recognized in *United States* v. *Rojas-Contreras*, 474 U.S. 231, 236 (1985), that a district court should use that "broad discretion" to "take care of any case in which the Government seeks a superseding indictment which operates to prejudice a defendant." In accordance with petitioner's own presentation in the court of appeals (Pet. C.A. Br. 18), the court of appeals treated petitioner's challenge (Pet. App. A10) as turning on whether petitioner showed prejudice from the denial of a continuance. The court of appeals correctly held (*id.* at A10-A15) that petitioner had failed to make such a showing.

Petitioner's principal claim in this Court (Pet. 17, 26-27) is that the court of appeals failed to consider his need to prepare a defense to the new charges and to evaluate the impact of the superseding indictment on his theory of

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confirmation slips were only incidental to his scheme to defraud. In addition, petitioner argued that the district court committed plain error by failing to instruct the jury that it was required to find that he knew of Kramer Levin's confidentiality policy and that he knew he was violating the policy when he disclosed the confidential information. The court of appeals concluded (Pet. App. A16-A17, A20) that both arguments were "frivolous," and petitioner does not renew them here.

defense. That contention is wrong. The court of appeals did not overlook petitioner's assertion of prejudice; it merely demanded that petitioner do more than baldly assert an adverse effect on his defense. The court properly required petitioner to show with particularity how his defense was prejudiced, and it concluded that each of petitioner's particular claims of prejudice was without merit.

Thus, the court of appeals correctly rejected (Pet. App. A11-A13) petitioner's primary allegation of prejudice from the superseding indictment—namely, that the indictment allowed admission of certain inculpatory co-conspirator statements made by David Lev, Shimon Lev, and Norman Stein. Those statements, the court observed (*id.* at A12 (emphasis in original)), "would have been *equally* admissible (or inadmissible) under either indictment" as evidence of fraudulent intent. For that reason, the court concluded, petitioner could not point to the co-conspirator statements as an adverse conequence of the new indictment. Petitioner does not challenge that conclusion in this Court. With respect to petitioner's less specific assertion that the denial of a continuance impaired his ability to defend against the new charges that were added by the superseding indictment (involving the Listokin trades), the court of appeals explained (*id.* at A13-A14) that petitioner had not pointed to any aspect in which he had been unfairly denied adequate time to prepare a defense. The court of appeals pointed out (*ibid.*) that the government had provided petitioner with full discovery regarding the Listokin trades three months before the return of the superseding indictment and that those trades were being investigated in the parallel SEC civil proceeding. The court concluded (*id.* at A14) that "[petitioner] therefore both knew that the government would be using the Listokin trades at trial and had the opportunity to attack the telephone records for accuracy." Finally, the court concluded (*ibid.*) that petitioner suffered no prejudice from the new indictment's

allegation that petitioner personally benefited from the fraudulent scheme, because that allegation was not a required element of any of the offenses alleged in the indictment. Petitioner does not challenge that conclusion either.

At bottom, petitioner simply disagrees with the conclusion of both courts below that he failed to show that he needed more time to prepare his defense than he was afforded after the superseding indictment was returned. Petitioner's claim that he was entitled to additional time is based on nothing more than his unsubstantiated assertion (Pet. 20) that the superseding indictment "compelled him to adjust his overall defense." But petitioner has never explained how his general "failure-of-proof" defense at trial was altered by the return of the superseding indictment.[5] The court of appeals found (Pet. App. A15) that "the superseding indictment did not alter substantially the government's case against [petitioner]" and "[i]ts return, even two days before trial, caused him no prejudice." Those factbound conclusions do not warrant further review.[6]

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[5] Indeed, when petitioner sought a continuance in the district court, he did not make any particularized showing of how the superseding indictment required him to alter his trial strategy or otherwise required additional time to prepare a defense. Yet this Court has made clear that "the reasons presented to the trial judge at the time the request [for a continuance] is denied" are particularly important in evaluating whether the trial court abused its discretion. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).

[6] Because the court of appeals considered the impact of the superseding indictment on petitioner's need for additional preparation, there is no merit in petitioner's claim (Pet. 18, 26-27) that the decision here conflicts with *United States* v. *Guzman*, 754 F.2d 482 (2d Cir. 1985), cert. denied, 474 U.S. 1054 (1986). In any event, petitioner's claim of an intracircuit conflict would raise an issue for the court of appeals, and not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Petitioner does not otherwise point to any conflict among the circuits on the continuance question.

2. Petitioner next contends (Pet. 31-47) that his use of fraudulently misappropriated information for trading in securities did not violate the federal securities laws. This contention involves legal issues that have not been widely considered by the lower courts. Indeed, the Second Circuit is the only court of appeals that has yet had occasion to address the theory on which petitioner's conviction under Section 10(b) and Rule 10b-5 is based—that fraudulent misappropriation of confidential information for use in securities trading constitutes fraud in connection with the purchase or sale of securities.[7] In the absence of discussion of the issue by other courts of appeals, let alone a split in the circuits, consideration by this Court would be premature. In any event, as we now explain, petitioner was correctly convicted of securities fraud under the misappropriation theory, and the question that evenly split this Court in *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), slip op. 5, is not presented here.

Section 10(b) prohibits the use, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device or contrivance" in violation of rules promulgated by the SEC. 15 U.S.C. 78j(b).[8] Rule 10b-5 in turn prohibits "*any* person" from engaging in "*any* act" [or] practice" that "operates or would operate as a fraud or

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[7] See *United States* v. *Carpenter,* 791 F.2d 1024 (2d Cir. 1986), aff'd in relevant part by an equally divided court, No. 86-422 (Nov. 16, 1987); *SEC* v. *Materia,* 745 F.2d 197 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *United States* v. *Newman,* 664 F.2d 12 (1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983). Cf. *Rothberg* v. *Rosenbloom,* 771 F.2d 818, 825 (3d Cir. 1985) (Higginbotham, J., concurring); *SEC* v. *Clark,* No. 87-711Z (W.D. Wash. Sept. 8, 1988).

[8] Petitioner seems to attach significance (Pet. 35-36) to the fact that "manipulation" generally refers to practices that are intended artificially to affect market activity, such as wash sales, matched orders, or rigged prices. It is not clear what point petitioner is trying to make, as manipulation was not charged in this case.

deceit upon *any* person" in connection with the purchase or sale of securities. 17 C.F.R. 240.10b-5 (emphasis added). This Court has consistently construed those provisions broadly, noting that Section 10(b) is "a 'catchall' clause to enable the Commission to 'deal with new manipulative or cunning devices' " (*Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 203 (1976) (brackets omitted)) and that the statute and rule "are obviously meant to be inclusive." *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 151 (1972). See generally *Herman & Maclean* v. *Huddleston,* 459 U.S. 375, 386 (1983); *United States* v. *Naftalin,* 441 U.S. 768, 773 (1979). See also S. Rep. 792, 73d Cong., 2d Sess. 6 (1934).

Petitioner's conduct was plainly fraudulent. Indeed, petitioner does not appear to dispute that he committed fraud when he misappropriated information that was held in confidence by the law firm employing him and by its client, and then gave the information to others for them to use in purchasing securities. When petitioner misappropriated—"stole to put it bluntly" (*Chiarella* v. *United States,* 445 U.S. 222, 245 (1980) (Burger, C. J., dissenting)—the confidential information, he committed what this Court has referred to as "a 'garden variety' type of fraud." *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U.S. 6, 11 n.7 (1971). See *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), slip op. 7-8 (finding that the misappropriation of confidential information used in securities trading constitutes fraud under the mail and wire fraud statutes); *United States* v. *Newman,* 664 F.2d 12, 18 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983).[9]

[9] Outside the securities context, this Court has found similar breaches of fiduciary duty to be fraudulent. See, *e.g., United States* v. *Carter,* 217 U.S. 286, 305-310 (1910); *Wardell* v. *Railroad Co.,* 103 U.S. 651, 654-659 (1880).

Petitioner argues (Pet. 33-34) that his fraud was not "in connection with" the purchase or sale of securities. But the sole purpose of petitioner's scheme was to use the stolen information secretly and deceptively to trade in securities and thereby "reap instant no-risk profits in the stock market." *SEC* v. *Materia,* 745 F.2d 197, 203 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985). The fraud had no purpose other than to facilitate the purchase or sale of securities.

Moreover, contrary to petitioner's assertion (Pet. 31-32), Section 10(b) and Rule 10b-5 are not limited to frauds whose direct victims are those who actually purchase or sell securities. While this Court has held that a private litigant bringing a Rule 10b-5 damages action must be a purchaser or seller of securities (*Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975)), that ruling concerns plaintiffs' standing and applies only to private suits (*id.* at 740-744); it is not based on any limitation of Rule 10b-5 to frauds committed on purchasers or sellers. Indeed, this Court's decision in *United States* v. *Naftalin,* 441 U.S. 768 (1979), makes it clear that in a government enforcement action the victim of securities fraud need not be a purchaser or seller, or even an investor. This is consistent with the language of Rule 10b-5, which, by its terms, proscribes "any * * * fraud" committed on "any person."[10]

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[10] Petitioner cites then-Judge Stevens' opinion for the Seventh Circuit in *Eason* v. *General Motors Acceptance Corp.*, 490 F.2d 654, 659 (1973), cert. denied, 416 U.S. 960 (1974), as imposing a "requirement that the injured party be an investor" (Pet. 38 n.3). That case is not applicable here. The injured party in *Eason* was in fact an investor, and because the action was a private suit for damages, there was no reason for the *Eason* court to determine whether, in a government enforcement action, the victim of the fraud must be an investor.

This case well illustrates why frauds like petitioner's are within the purpose of Section 10(b) and Rule 10b-5 to protect the securities markets. The jury was charged, in accordance with the indictment, that it could convict if it found actual or potential injury either to Kramer Levin or to its client, the pension plan. See Tr. 1369. The pension plan was, of course, a significant Colt shareholder, and following petitioner's fraudulent use of its information, the plan traded in Colt securities. Even if we focus only on the fraud committed on the law firm, however, it is clear that petitioner's fraud threatened direct "market participants," such as the pension plan. The plan was seeking advice on the fairness of a recapitalization, in which it would exchange its existing securities for new securities while other shareholders would receive a mix of cash and securities. Market activity generated by petitioner's tips could have affected the firm's analysis of the recapitalization or the terms of the recapitalization itself. Moreover, petitioner's argument fails to recognize that the illegal trading he caused directly undermined the integrity of the securities markets. His scheme permitted his tippees to make trades with an advantage grounded on their use of fraudulently misappropriated information that was not lawfully available to the other parties to the transactions. Such conduct is the antithesis of the "open and honest market" for securities that Section 10(b) was intended to protect. *Materia*, 745 F.2d at 203. See *Naftalin*, 441 U.S. at 775 (emphasis omitted) (the securities laws aim " 'to achieve a high standard of businesss ethics * * * in every facet of the securities industry' " (quoting *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-187 (1963)).

Petitioner further asserts (Pet. 39) that this Court's decisions in *Chiarella* v. *United States*, 445 U.S. 222 (1980), and *Dirks* v. *SEC*, 463 U.S. 646 (1983), hold that "trading

securites on the basis of undisclosed information is fraud under section 10(b) and Rule 10b-5 only where the trader owes a duty of disclosure [to] a market participant." But *Chiarella* and *Dirks* say no such thing. Those decisions merely hold that it does not suffice to allege simply that the defendants defrauded the other parties to the transactions by trading or causing trading without disclosing material nonpublic information to those other parties, where the defendants owed no duty of disclosure to those parties. See *Dirks*, 463 U.S. at 653-654; *Chiarella*, 445 U.S. at 228-230. Neither decision remotely suggests that a fraud committed on a person by misappropriating confidential information from that person—especially a person who was entrusted with the information by a direct market participant—is outside the coverage of Rule 10b-5. In *Chiarella*, no such theory was presented to the jury; indeed, all four Justices who spoke to the issue suggested that a misappropriation theory might be valid.[11] In *Dirks*, the issue did not arise because, as the Court was careful to note (463 U.S. at 665), the defendant did not misappropriate any information.[12] Since *Dirks* and *Chiarella*,

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[11] See 445 U.S. at 239 (Burger, C. J., dissenting); *id.* at 238 (Brennan, J., concurring in the judgment); *id.* at 245 (Blackmun, J., joined by Marshall, J., dissenting).

[12] Petitioner incorrectly argues (Pet. 47) that he was charged as a "tippee" of the law firm or its client and that the standards for tippee liability set forth in *Dirks* were not met here. *Dirks* involved an allegation that Dirks was improperly "tipped" by a company insider about secret corporate developments and thereby acquired the fiduciary duties of an insider to the company and its shareholders. 463 U.S. at 655-656. This Court held that, because the insider received no benefit for his tips, Dirks, who was a stranger to the company, acquired no such duties (*id.* at 665-667). Petitioner, by contrast, was not charged as a tippee. The duties he breached in misappropriating information and passing it on to others stemmed not from his receipt of an illegal "tip," but from his position as an attorney at the law firm. Thus, peti-

moreover, this Court, rather than questioning the validity of the misappropriation theory, has in fact suggested that trading on "misappropriate[d] or illegally obtain[ed] information" constitutes fraud in violation of Rule 10b-5. *Bateman Eichler, Hill Richards, Inc.* v. *Berner,* 472 U.S. 299, 313 n.22 (1985) (quoting *Dirks*, 463 U.S. at 665).[13]

Finally, petitioner incorrectly asserts (Pet. 43 (footnote omitted)) that further review of this case is justified on the ground that the validity of the misappropriation theory "evenly split this Court in its most recent analysis of the issue" in *Carpenter* v. *United States, supra.* Petitioner misunderstands the *Carpenter* case. *Carpenter* involved a securities fraud conviction—which was affirmed by an equally divided Court without any discussion of the issue—where a newspaper with "no interest in the securities traded" was "the only alleged victim of the fraud" (slip op. 5). Here, in contrast, the wrongdoer's employer, the law firm that was defrauded, was entrusted with confidential information by a securities holder and thereby had a fiduciary relationship to a direct market

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tioner's assertion (Pet. 47) that he breached no duty because the "alleged tipper—whether it be Petitioner's law firm or its client"—did not benefit from the disclosure to petitioner is misdirected. Petitioner had duties arising out of his own position, not because he was a tippee.

[13] The misappropriation theory has also been recognized in Congress as a valid basis for liability under the securities laws. The House Report accompanying the Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264, explained that "[i]n other areas of the law, deceitful misappropriation of confidential information by a fiduciary * * * has consistently been held to be unlawful"; the report added that Congress "has not sanctioned a less rigorous code of conduct under the federal securities laws." H.R. Rep. 98-355, 98th Cong., 1st Sess. 5 (1983) (footnotes omitted).

participant. In addition, the law firm was not the only victim of the fraud: the client pension plan, which traded in Colt securities, was also a victim of the fraud.

3. Petitioner also contends (Pet. 48-55) that he did not commit mail fraud because the confidential information concerning the Colt recapitalization plan that he misappropriated was not "property" within the meaning of the mail fraud statute. That contention is meritless.

In *Carpenter* v. *United States,* this Court upheld the mail and wire fraud convictions of a Wall Street Journal reporter who traded stock in anticiption of the publication of the Journal's "Heard on the Street" column, a well-known feature that often had an effect on the market price of the stocks discussed there (slip op. 3). The Court in *Carpenter* made clear that the intangible nature of the misappropriated confidential business information did not make that information any less a form of "property" within the meaning of the mail fraud statute (*id.* at 6).[14] The Court explained that " 'a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom' " (*id.* at 8 (citation omitted)). The Court concluded that the Journal had a property interest

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[14] In *McNally* v. *United States*, No. 86-234 (June 24, 1987), the Court held that the mail fraud statute does not proscribe "schemes to defraud citizens of their intangible rights to honest and impartial government" (slip op. 5). As this Court later explained in *Carpenter,* such a scheme is "too ethereal in itself to fall within the protection of the mail fraud statute, which 'had its origin in the desire to protect individual property rights' " (slip op. 6 (quoting *McNally,* slip op. 9 n.8)).

in maintaining the confidentiality of the contents and timing of its column (*id.* at 6) and that, because the reporter obtained the information in the course of his employment, he was bound not to use it in a manner not authorized by the Journal (*id.* at 8).

The court of appeals in this case correctly held that the confidential information misappropriated by petitioner was no less a form of property than the information at issue in *Carpenter*. The information was, of course, confidential information held by the pension plan in its capacity as shareholder and by Kramer Levin in its capacity as a law firm; it was of substantial value to both—indeed, it was essential to the ability of both the law firm and the pension plan trustees to carry out their responsibilities. As the court of appeals observed with respect to the law firm (Pet. App. A18), by appropriating the confidential information concerning the Colt recapitalization plan petitioner affected Kramer Levin's economic interests, in that the law firm sought to preserve its business reputation by maintaining the confidentiality of the information, "with the result that it would not lose its clients and perhaps would gain more clients." Similarly, the pension plan had an economic interest in preserving the confidentiality under which it had been entrusted with early information about the recapitalization.

Contrary to petitioner's suggestion (Pet. 51-53), it is irrelevant that the information concerning the Colt recapitalization was not obtained by Kramer Levin or its client in the same manner as the Wall Street Journal acquired its confidential information in *Carpenter*. Although the Court in *Carpenter* observed that the Journal had gathered its information through its own enterprise and had the exclusive right to exploit the information (slip op. 7), those factors are not prerequisites to a business's having a property interest in information. As

the court of appeals observed (Pet. App. A18 (emphasis in original)), the Court's opinion in *Carpenter* "merely *describes* the confidential information in that case; it does not require that *all* confidential information must be of the same nature to be considered 'property.' " Here, Kramer Levin acquired the information concerning the Colt recapitalization from its client through a confidential relationship solely for the purpose of providing legal services and with the understanding that the information would remain confidential. Accordingly, even though Colt developed the information about the recapitalization, Kramer Levin and the pension plan had property interests in maintaining the confidentiality of that information.

It is likewise irrelevant, contrary to petitioner's suggestion (Pet. App. 51-52), that his misappropriation of the confidential information may not have interfered with the ability of Kramer Levin or the pension plan to use the information, and that the law firm suffered no monetary loss. This Court expressly rejected similar arguments in *Carpenter*. Slip op. 7 ("Petitioners' arguments that they did not interfere with the Journal's use of the information or did not publicize it and deprive the Journal of the first public use of it * * * miss the point"). Indeed, the Court made clear in *Carpenter* that a scheme to defraud does not require an actual monetary loss in order to fall within the scope of the mail fraud statute (*ibid.*). It was sufficient here that Kramer Levin, together with its client, was deprived of the right to use the confidential information exclusively for the purpose for which that information had been entrusted to the law firm.[15]

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[15] Petitioner asserts (Pet. 49-51, 54-55) that this Court should grant his petition because the lower courts are in "disarray" and need further guidance on what constitutes property protected by the mail fraud statute. As petitioner appears to concede, however, none of the cases that he cites (*id.* at 50-51) conflicts with the decision of the court of ap-

4. Finally, petitioner renews his contention (Pet. 56-58) that the government violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to turn over the transcripts of the grand jury testimony of Shimon Lev. That contention is likewise without merit.

It is well settled that *Brady* does not require the government to turn over exculpatory evidence if a defendant knows or should have known the essential facts permitting him to take advantage of the exculpatory evidence. See, *e.g.*, *United States* v. *Valera*, 845 F.2d 923, 927-928 (11th Cir. 1988); *United States* v. *Wolf*, 839 F.2d 1387, 1391-1392 (10th Cir. 1988); *United States* v. *Esposito*, 834 F.2d 272, 275 (2d Cir. 1987); *United States* v. *Dupuy*, 760 F.2d 1492, 1501-1502 & n.5 (9th Cir. 1985); see also *United States* v. *Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977) ("numerous cases have ruled that the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain [for] himself"). Here, the government specifically notified petitioner more than a week before trial that Shimon Lev might have given exculpatory testimony before the grand jury (Pet. App. A9, A16). Since that letter plainly made known to petitioner that Shimon Lev could provide exculpatory evidence, he could

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peals here. Thus, of the four cited decisions in which the court found no property interest, one involved the same instruction that the Court found invalid in *McNally* (*United States* v. *Ochs*, 842 F.2d 515 (1st Cir. 1988)), and two involved alleged fraudulent deprivation of typical *governmental* powers (*United States* v. *Murphy*, 836 F.2d 248 (6th Cir. 1988) (bingo permits); *United States* v. *Evans*, 844 F.2d 36 (2d Cir. 1988) (control of arms sales)). Only one of the cited decisions involved a private interest (*United States* v. *Baldinger*, 838 F.2d 176 (6th Cir. 1988)), and the court there found it critical that the defendant's conduct was "unrelated to motives of [proprietary] gain" (*id.* at 179-180). The present case, of course, involved a private interest that the defendant misappropriated for proprietary gain.

easily have taken advantage of that information by calling Shimon as a witness. See *United States* v. *LeRoy,* 687 F.2d 610, 619 (2d Cir. 1982) (calling the grand jury witness to testify is the "obvious course"), cert. denied, 459 U.S. 1174 (1983). Petitioner, however, did not call Shimon as a witness, even though Shimon was readily available to him. For that reason, the court of appeals properly concluded (Pet. App. A15) that "[n]o *Brady* violation occurred here."

Petitioner argues principally (Pet. 56-58) that the grand jury transcripts might have been used, pursuant to Fed. R. Evid. 806, to impeach the co-conspirator hearsay declarations of Shimon Lev (to which David Lev testified). As the court of appeals observed (Pet. App. A16), however, petitioner never explained to the district court before or during trial that he wanted the grand jury transcripts so that he could impeach Shimon Lev's credibility by the inconsistencies between his grand jury testimony and his declarations to David Lev. And when petitioner first raised his claim in a post-trial motion, he failed to show that the grand jury testimony was admissible to attack Shimon Lev's co-conspirator declarations. Accordingly, the court of appeals properly concluded (Pet. App. A16) that petitioner had waived his claim to the transcripts based on Fed. R. Evid. 806.

In any event, the government's failure to turn over the grand jury transcripts for impeachment purposes did not violate *Brady* because the evidence was not material to the determination of guilt. See *United States* v. *Agurs,* 427 U.S. 97, 107-110 (1976); *Brady* v. *Maryland,* 373 U.S. at 104. Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Pennsylvania* v. *Ritchie,* No. 85-1347 (Feb. 24, 1987), slip op. 15; *United States* v. *Bagley,* 473 U.S. 667, 682 (1985). There is no such reasonable probability of a different result in this case. After petitioner raised his

claim in a post-trial motion, the district court reviewed the transcripts of Shimon Lev's grand jury testimony *in camera*. Based on that review, the district court found that "even if [petitioner] had those minutes it would have no effect whatever on the outcome of the trial" (9/15/87 Tr. 5). Indeed, the court concluded that the grand jury testimony, if admitted, "would have been highly damaging to the defendant's case because of the contents" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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